(2)

NO. 87-522

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

VICTORIA A. SMITH,
Petitioner

V.

TEXAS DEPARTMENT OF WATER RESOURCES
AND
THE EXECUTIVE DIRECTOR OF THE
TEXAS DEPARTMENT OF WATER RESOURCES,
Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

JAMES C. TODD, Chief
General Litigation

DONALD E. BRANSON
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120

ATTORNEYS FOR RESPONDENTS

19pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

PAGE

STATUTES

NO. 87-522

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

VICTORIA A. SMITH,
Petitioner

V.

TEXAS DEPARTMENT OF WATER RESOURCES
AND
THE EXECUTIVE DIRECTOR OF THE
TEXAS DEPARTMENT OF WATER RESOURCES,
Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the Texas Department of Water Resources and its Executive Director, Respondents, through their attorney of record, the Attorney General of the State of Texas, and file this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Victoria A. Smith brought suit against her former employer, the Texas Department of Water

Resources ("TDWR"), and its Executive Director, Charles E. Nemir, in his official capacity, alleging that her discharge from employment was an illegal retaliation for her opposition to a discriminatory employment action, and so was in violation of §704(a) of Title VII, the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a).

Finding the district court's version of the evidence plausible and hence not clearly erroneous under Fed.R.Civ.P. 52(a), the Fifth Circuit panel recounted that "Smith was directed to perform secretarial relief work ... and refused to do so despite at least two warnings that a refusal would result in termination. She chose this act of insubordination in lieu of complying with the order and challenging it through proper legal procedures." *Smith II*, 818 F.2d 363, 365 (1987).

Smith did not accede because she thought she had advanced beyond secretarial duties. Nevertheless, *someone* was needed to cover when the secretary was away.

The dissent believes that pointedly failing to accept an assigned task is not insubordination. *Smith II*, at 365. The dissent calls it "silent opposition," and would hold such to be protected under §704(a), even though an employee need not be sure that the practice she is opposing is unlawful. *Smith II*, at 365. *See, Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 86 (1982) (holding that a plaintiff claiming opposition need not prove that the practice she opposed was indeed unlawful, just that plaintiff had a reasonable belief that it was unlawful). The dissent is quite alone here; no opinion from any circuit voices this "silent opposition" view.

Contrary to Petitioner's belief that the Fifth Circuit has in effect rendered all employee opposition unprotected by §704(a), 42 U.S.C. §2000e-3(a), except for filing complaints (see Petitioner's Brief, page 7), the Fifth Circuit panel here explicitly reaffirmed that "picketing activities or other complaints of discrimination" are protected by §704(a). *Smith II*, 818 F.2d at 365.

It is simply false that in the Fifth Circuit §704(a) protects only access to the EEOC and the courts. To do so would be to ignore the "opposition clause" of §704(a) altogether and recognize only the "participation clause". Neither the Fifth Circuit nor any other circuit has so restricted §704(a). Indeed, *Payne's* "reasonable belief" test reveals the degree to which the Fifth Circuit has accommodated complaining employees under §704(a). Petitioner's claim that "the Fifth Circuit apparently requires the employee to demonstrate that the employment practice being opposed is 'immoral, degrading, or dangerous to health.' *Id.*, 818 F.2d at 370." (Petitioner's Brief, page 7). This is completely unfounded. In fact, no such words appear on page 370.

In both *Smith I* and *Smith II* the panel acknowledges that this case is a factually difficult case in which the evidence could easily lead to "sharply conflicting conclusions." *Smith II*, 818 at 364; *Smith I*, 799 F.2d at 1029. There is, however, nothing problematic about the law.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Circuits are in complete and explicit accord.

Concerning 42 U.S.C. 2000e-3(a), §704(a) of the Civil Rights Act of 1964, Petitioners claim a split among the circuits -- that different and even contravening tests have evolved. Yet Petitioner fails to set before us these allegedly different tests. Petitioner in fact cannot do so because there is no such split among the circuits, no different or contrasting §704(a) tests.

What Petitioner offers instead is a superficial review of a few cases from different circuits in which similar facts allegedly produce different results. A slightly closer look at these cases reveals crucial facts that plainly explain each result. Even if that were not so, however, it would not be surprising to find differences of opinion arising when the central issue is someone's motive: was it retaliation or not? When factfinders must discern motivation and ultimately believe or disbelieve the proferred reasons that Plaintiff alleges are pretext, reasonable minds can reach different conclusions. That is precisely why we leave that and other difficult fact questions to the trial court rather than to an appellate court.

Petitioner, however, points to such differences in fact interpretations and attempts to persuade that they are differences in law: in particular, that different tests have evolved among the circuits. Yet Petitioner can name and explicate only one test: the *Hochstadt* balancing test, found in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976).

The Fifth and Sixth Circuit, Petitioner acknowledges, employ the *Hochstadt* balancing test in which the court, cognizant of the plain intent of §704(a), and the plain difference between the "opposition clause" and the "participation clause" of §704(a), weighs the employee's interest in voicing opposition to discriminatory practices against the employer's interest in carrying on his business while disputes are dealt with in a fair and proper manner. It should not be surprising when courts rule against the employee who, in expressing his opposition, chooses to bypass or augment established grievance procedures which all agree are fair and satisfactory. How can an employer maintain control of his business when an employee can simply refuse to perform a task because he or she thinks it is discriminatory? There is no opinion from any circuit holding that §704(a) permits that form of opposition. The balancing test fairly and satisfactorily encompasses such issues.

It is simply false that either the Fifth Circuit or the Sixth Circuit reads §704(a) as telling the employee to "Do what you're told, no matter what." (Petitioner's Brief, page 10). Nor does the Sixth Circuit, any more than the Fifth, hold that §704(a) protects only access to the EEOC and the courts, notwithstanding what "Petitioner believes." (Petitioner's Brief, page 8).

Petitioner tries to argue that the Third, Fourth, Seventh and Ninth Circuits use some different test. We are never told, however, what that different test is.

A. The Third Circuit.

From the Third Circuit Petitioner cites *Novotny v. Great American Savings & Loan Assn.*, 584 F.2d

1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), and *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960 (3rd Cir. 1978), for the proposition that §704(a) protects more than only access to the EEOC and the courts, as if the Fifth and Sixth Circuits disagree. They do not.

Petitioner finds that *Novotny* "suggests" that conduct which is neither illegal nor unreasonably interfered with an employer's legitimate interests would be protected by §704(a). But this is precisely the balancing test. Furthermore, the *en banc* Third Circuit explicitly finds itself in agreement with not only the Fifth Circuit but also the Eighth Circuit in reading the §704(a) "opposition clause" to protect more than merely access to the EEOC and the courts, for the simple reason that the "opposition clause" is distinct from the "participation clause". *Novotny*, 584 F.2d at 1260-61.

Petitioner suggests *Hicks* protects an employee action that is against the interest of the employer, as if the Fifth and Sixth Circuit approach would bar such a result. But of course a balancing test clearly makes room for just such a result; the outcome would depend on the weight of the employee's interest. The *Hicks* court, moreover, simply found that the plaintiff had mistakenly complained to HUD rather than the EEOC. To help explain that mistake, the court mentions that HUD was providing funding for the project on which Plaintiff was working. Contrary to Petitioner's statements, there is no suggestion that the complaint to HUD rather than to EEOC in some way harmed the employer's interests, or that plaintiff in any other way contravened the employer's interest in carrying on his business.

The Third and Fifth Circuits explicitly agree, and both use the balancing test. There is no divergence.

B. The Fourth Circuit.

From the Fourth Circuit Petitioner cites *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981), for the proposition that §704(a) protects an employee who refuses an assignment. In fact, the court saw that "her possible refusal ... was not the sole reason" for his dismissal. *Id.* at 448. Rather, the court keyed on the fact that the employer "had previously resolved to fire Armstrong if she continued complaining ... [which] complaints pertained to her segregated job classification, [and] the consequential differential in base pay between a female special salesman and a male regular salesman, ..." *Id.* at 448-49. These are crucial facts, especially disparate pay, that are absent in the case at bar.

Most importantly, in accord with the Fifth Circuit, the Fourth Circuit in *Armstrong* explicitly relies on the First Circuit's *Hochstadt* balancing test. *Id.* at 448. The court explicitly states that "[t]o fall under the protection of the 'opposition clause' in §704(a), behavior need not rise to the level of formal charges of discrimination." Here the Fourth Circuit cites its accord with the Ninth Circuit in *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-96 (9th Cir. 1978). It is also squarely in accord with the Fifth Circuit. To repeat, even the *Smith II* panel notes that other forms of opposition are protected. *Smith II*, 818 F.2d at 365.

Finally, the *Armstrong* court explicitly agrees that "[s]ection 704(a) ... was not intended to

immunize insubordination, disruptive, or *nonproductive* behavior at work. [citing *Green* and *Hochstadt*]. An employer must retain the power to discipline and *discharge* disobedient employees." *Id.* at 448 (emphasis added). That, too, is plainly in accord with the Fifth Circuit; it is the basis for the result in *Smith II*, the case at bar.

The Fourth Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

C. The Ninth Circuit.

From the Ninth Circuit Petitioner cites *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983). Even as petitioner sets it out, there is no disagreement here with the Fifth and Sixth Circuits. Indeed, the Ninth Circuit in *Crown Zellerbach* explicitly relies upon the *Hochstadt* balancing test. *Id.* at 1014-16. Moreover, they rely explicitly on the Fifth Circuit's "aptly summarized" version of the *Hochstadt* test, citing *Rosser v. Laborer's Int'l Union of North America*, 616 F.2d 221, 223 (5th Cir.), *cert. denied*, 101 S.Ct. 241 (1980). "The Fifth Circuit aptly summarized the [*Hochstadt*] doctrine," asking if the opposition was "unreasonable." *Crown*, at 1015.

The Ninth Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

D. The Seventh Circuit.

From the Seventh Circuit Petitioner cites *Mozee v. Jeffboat*, 746 F.2d 365, 373-74 (7th Cir. 1985), and *Jennings v. Tinley Park Community Consol. School Dist.*, 796 F.2d 962, 967-68 (7th Cir. 1986). Again, even as Petitioner sets them out, there is no disagreement here with the Fifth and Sixth

Circuits. Like the Fifth Circuit, the Seventh Circuit requires only that the "plaintiff has a reasonable belief that there is a Title VII violation." *Jennings*, 796 F.2d at 967. Like the Fifth, First and Fourth Circuits, the Seventh Circuit explicitly relies on the *Hochstadt* balancing test, remanding in *Mozee* to the district court to reconsider "in the light of the burdens of proof and established law on the subject as developed in cases such as ... *Hochstadt, supra*." *Mozee*, 746 F.2d at 374. *Jennings* is also a remand because the circuit court could not tell "what reason [for the discharge] the [district] court thought defendant had proven." Citing *Crown Zellerbach*, the Seventh Circuit simply notes that the term "disloyalty", *if left unexplicated*, will not do as a proferred reason for discharge under §704(a) because any assertion of Title VII rights involves some sense of disloyalty.

The Seventh Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

This concludes a review of all the cases Petitioner calls upon to show that the Fifth and Sixth Circuits disagree with the Third, Fourth, Seventh and Ninth Circuits. It is simply not so.

2. §704(a) needs no further explication.

Petitioner thinks this Court needs to say whether Congress intended to protect only access to the EEOC and the courts. But no circuit court has ever suggested that reading of §704(a). And for good reason: the simple word "or" in §704(a). As some courts have explicitly noted, and as all the circuits have agreed, that word makes it undeniably clear that §704(a) forbids retaliation against two sorts of actions: those in which someone has

"opposed any practice made an unlawful implyment practice by this subchapter, *or* made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The second clause, the "participation clause," is obviously what protects access to the EEOC and the courts. The first clause, the "opposition clause," plainly protects something further. No circuit court has ever presumed or held that the first clause, the "opposition clause," is merely an explication or restatement of the second clause, the "participation clause." The word "or" prevents that; the word "or" makes it plain that two different things are protected. Yet petitioner is asking this Court for an explanation, and a ruling, that §704(a) protects more than mere access to the EEOC and the courts. The supposed confusion simply does not exist. The Congressional intent is plain, the wording of §704(a) is plain, and the circuit courts are all in agreement.

Petitioner goes on to ask that an answer be given to the question what counts as protected opposition under the "opposition clause." Yet as Petitioner is well aware, it cannot ask the impossible of this Court: "that a foolproof formula ... be contrived for every case." (Petitioner's Brief, page 13). Petitioner admits that "trial judges will still have to balance the interests of employers and employees in light of a particular fact situation." (Petitioner's Brief, page 13). But that, of course, is precisely what the *Hochstadt* balancing test does.

3. The issue raised is factual only and pertinent only to this case.

This case presents only a factual dispute that concerns pretext. Plaintiff has presented a *prima*

facie case: that only she or other females were asked to do secretarial work. The Defendant has provided a legitimate nondiscriminatory reason: someone must cover for the secretary, and Plaintiff refused when asked. Plaintiff then had to meet the burden of showing that the reason was pretext.

The trial court found that plaintiff failed to carry that burden. The appellate court found no abuse of discretion. The dissent was convinced that Plaintiff had proven pretext, and that the district court had erred in not recognizing this. The difference at bottom is an evidentiary interpretation issue, not a legal issue, and is pertinent only to this particular case. That issue is: what was the employer's motive for the assignment and the discharge. Was it to illegitimately insure that only a woman is put in a woman's job, or was it to insure that employees comply with a legitimate request that places the only or best available employee in a position that needs to be covered?

It would be inappropriate for this Court to grant a writ of certiorari merely to resolve a factual issue of motive pertinent only to this case.

CONCLUSION

The writ of certiorari should be denied by the Court in this case because:

A) The Circuits are in solid accord.

B) Nothing indicates that the current law is unclear or inadequate.

C) The only issue raised by this case is one of factual interpretation pertinent to no other case.

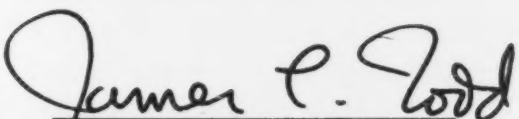
WHEREFORE, PREMISES CONSIDERED, Respondents Texas Department of Water Resources and the Executive Director of the Texas Department of Water Resources pray that the petition for writ of certiorari be denied.

Respectfully submitted,

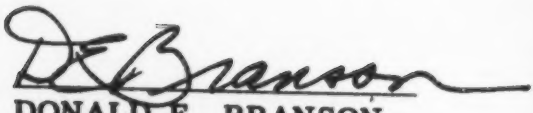
JIM MATTOX
Attorney General of
Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General
for Litigation



JAMES C. TODD, Chief
General Litigation
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120



DONALD E. BRANSON
Assistant Attorney
General
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondents' Brief in Opposition has been sent by U.S. Mail, certified, return receipt requested, to Stephen Greenberg, Small, Craig & Werkenthin, 100 Congress, #1100, Austin, Texas 78701; and to Sheila S. Asher, Small, Craig & Werkenthin, 100 Congress, #1100, Austin, Texas 78701 on this the 19th day of January, 1988.

James C. Todd

JAMES C. TODD
Assistant Attorney General